

Internal Revenue Service

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Person To Contact:

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Date:

April 19, 2010

TY:

LEGEND

Taxpayers =

Bank =

Firm 1 =

Firm 2 =

Date 1 =

Year 1 =

Year 2 =

\$aa = \$

\$bb = \$

\$cc = \$

\$dd = \$

Dear :

This letter is in response to the letter dated Date 1, submitted on your behalf by your authorized representative. In the letter, you request an extension of time to make an election to include net capital gain and qualified dividend income in net investment income under section 163(d)(1) and 163(d)(4)(B) of the Internal Revenue Code for tax year Year 1. Your request is submitted pursuant to sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS

Taxpayers are individuals who relied upon the assistance Firm 1 to prepare their individual income tax returns for Year 1. Firm 1 had prepared Taxpayers' individual income tax returns for five previous years and had extensive knowledge of Taxpayers' financial affairs. For Year 1, Firm 1 prepared a Form 4952, "Investment Interest

Expense Deduction” reporting \$aa of investment interest expense. Taxpayers had sufficient investment income to deduct \$bb of the investment interest expense, and elected to carry forward the remaining \$cc of investment interest expense. In an affidavit, Firm 1 represents that in preparing the Form 4952 for Year 1, Firm 1 did not make an election to treat qualified dividends or net capital gain from the disposition of property held for investment as investment income.

Taxpayers subsequently engaged Firm 2 to prepare Taxpayers’ individual income tax returns for Year 2 and to review Taxpayers’ Year 1 returns. While reviewing the Year 1 returns, Firm 2 discovered that Firm 1 had failed to report \$dd of Taxpayers’ investment interest expense paid to Bank. Firm 2 advised Taxpayers to file a private letter ruling request for an extension of time to amend their Year 1 return to make an election on Form 4952 to treat qualified dividends or net capital gain from the disposition of property held for investment as investment income. Firm 2 prepared Taxpayers’ letter ruling request.

In an affidavit, Firm 1 represents that Taxpayers provided Firm 1 with the annual tax reporting statements provided to Taxpayers by Bank for tax year Year 1. Firm 1 represents that the annual tax reporting statements from Bank omitted the \$dd of investment interest expense paid by Taxpayers to Bank for tax year Year 1. Firm 1 represents that, had the statements provided by Bank to Taxpayers included the \$dd of investment interest expense for Year 1, Firm 1 would have advised Taxpayers to make the election to treat qualified dividends and net capital gain from the disposition of property held for investment as investment income. Taxpayers represent that they relied on Firm 1 to make the necessary inquiries to prepare complete and accurate tax returns.

LAW AND ANALYSIS

Section 163(d)(1) of the Internal Revenue Code provides that in the case of a taxpayer other than a corporation, the amount allowed as a deduction for investment interest for any taxable year shall not exceed the net investment income of the taxpayer for the taxable year.

Section 163(d)(4)(B) provides, in part, that investment income means the sum of:

- (i) gross income from property held for investment (other than any gain taken into account under clause (ii)(I));
- (ii) the excess, if any of:
 - (I) the net gain attributable to the disposition of property held for investment, over

(II) the net capital gain determined solely by taking into account gains and losses from dispositions of property held for investment; plus

(iii) so much of the net capital gain referred to in clause (ii)(II) (or, if lesser, the net gain referred to in clause (ii)(I)) as the taxpayer elects to take into account under this clause. Such term shall include qualified dividend income (as defined in section 1(h)(11)(B)) only to the extent the taxpayer elects to treat such income as investment income for the purposes of this subsection.

Section 1.163(d)-1(b) provides that the elections for net capital gain and qualified dividend income must be made on or before the due date (including extensions) of the income tax return for the taxable year in which the net capital gain is recognized or the qualified dividend income is received.

Section 301.9100-1(c) provides that the Commissioner of Internal Revenue, in exercising his discretion, may grant a reasonable extension of time (but not more than 6 months, except for a taxpayer who is abroad), under the rules set forth in section 301.9100-3 to make a regulatory election under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I. The term “regulatory election” is defined in section 301.9100-1(b) as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) provides that requests for relief subject to this section will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer:

- (i) requests relief before the failure to make the regulatory election is discovered by the Service;
- (ii) inadvertently failed to make the election because of intervening events beyond the taxpayer’s control;
- (iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;
- (iv) reasonably relied on the written advice of the Service; or
- (v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make the election.

Paragraphs (b)(3)(i) through (iii) of section 301.9100-3 provide that a taxpayer is deemed not to have acted reasonably and in good faith if the taxpayer:

(i) seeks to alter a return position for which an accuracy-related penalty could be imposed under section 6662 at the time the taxpayer requests relief and the new position requires or permits a regulatory election for which relief is requested;

(ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or

(iii) uses hindsight in requesting relief. If specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief. In such a case, the Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

Section 301.9100-3(c)(1) provides that the interests of the government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made. The interests of the government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made, or any taxable years that would have been affected by the election had it been timely made, are closed by the period of limitations on assessment.

CONCLUSION

Taxpayers' election is a regulatory election, as defined under section 301.9100-1(b), because the due date of the election is prescribed in the regulations under section 1.163(d)-1(b). In the present situation, the requirements of sections 301.9100-1 and 301.9100-3 have been met. The information and representations provided by Taxpayers establish that Taxpayers acted reasonably and in good faith. The affidavits presented show that the Taxpayers reasonably relied on tax professionals for the filing of their return; however due to an omission by Bank in preparing the annual tax reporting statements, the tax professionals failed to make, or advise the Taxpayers to make, the election. The affidavits presented show that the Taxpayers were unaware of the necessity for the election and upon discovery of the error requested relief.

Taxpayers are not seeking to alter a return position for which an accuracy-related penalty had been or could be imposed under section 6662 at the time relief was requested. Taxpayers were not informed in all material respects of the required election, and its related tax consequences. Furthermore, Taxpayers are not using hindsight in requesting relief. Taxpayers have represented that specific facts have not changed since the original deadline that make the election advantageous to the

Taxpayers. Moreover, the taxable year in which the regulatory election should have been made, and any taxable years that would have been affected by the election had it been timely made, are not closed by the period of limitation on assessment.

Finally, granting an extension will not prejudice the interests of the Government. It is represented that the Taxpayers will not have a lower tax liability in the aggregate for all taxable years affected by the election if given permission to make the election in the appropriate amount at this time than the Taxpayers would have had if the election were made in the appropriate amount by the original deadline for making the election. Accordingly, Taxpayers are granted an extension of time of 60 days from the date of this letter to make the election.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Norma C. Rotunno
Assistant to the Branch Chief, Branch 2
(Income Tax & Accounting)